No. 76-489

In the Supreme Court of the United States

OCTOBER TERM, 1976

UNITED STATES OF AMERICA, APPELLANT

v.

BOARD OF SUPERVISORS OF WARREN COUNTY, MISSISSIPPI, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

JURISDICTIONAL STATEMENT

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CITATIONS

Cases:

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OPINION BELOW

The findings, conclusions and order of the district court ~~plan~~ are not reported (App., *infra*, pp. 1a-9a).

JURISDICTION

The three-judge district court entered its "Findings of Fact, Conclusions of Law and Mandatory Injunction Directing Election on May 13, 1976 (App.,

infra, pp. 1a-9a),[1] a clarifying order on June 2, 1976 (App., *infra*, pp. 10a-12a), and a further modification, announced July 10, 1976, on July 19, 1976 (App., *infra*, pp. 19a-20a).[2]

The notice of appeal was filed on July 9, 1976 (App., *infra*, pp. 21a-22a), and an amended notice was filed August 13, 1976 (App., *infra*, pp. 23a-24a). On August 31, 1976, Mr. Justice Powell enlarged the United States' time for docketing the appeal to and including October 7, 1976.

The jurisdiction of this Court rests on 42 U.S.C. 1973c and 28 U.S.C. 1253. *Allen* v. *State Board of Elections*, 393 U.S. 544, 560-563; *Perkins* v. *Matthews*, 400 U.S. 379; *Georgia* v. *United States*, 411 U.S. 526.

QUESTION PRESENTED

Whether, in a suit by the United States to enjoin a redistricting plan implemented by a Mississippi county without preclearance under Section 5 of the Voting Rights Act, the district court has jurisdiction to pass upon the constitutional merits and to order a new plan into effect.

STATUTES INVOLVED

Section 5 of the Voting Rights Act of 1965, 79 Stat. 439, as amended, 42 U.S.C. (Supp. V) 1973c, provides:

[1] On July 1, 1975, the district court had entered an injunction requiring appellant to submit a new plan (App., *infra*, pp. 13a-18a).

[2] Another clarifying order was filed on September 9, 1976 (App., *infra*, pp. 25a-26a).

Sec. 5. Whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) based upon determinations made under the first sentence of section 4(b) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) based upon determinations made under the second sentence of section 4(b) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) based upon determinations made under the third sentence of section 4(b) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect in November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color,

or in contravention of the guarantees set forth in section 4(f)(2), and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with

the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court.

Section 12(d) and (f) of the Voting Rights Act of 1965, 79 Stat. 444, 42 U.S.C. 1973j(d) and (f), provide:

> (d) Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by section 2, 3, 4, 5, 7, 10, 11, or subsection (b) of this section, the Attorney General may institute for the United States, or in the name of the United States, an action for preventive relief, including an application for a temporary or permanent injunction, restraining order, or other order, and including an order directed to the State and State or local election officials to require them (1) to permit persons listed under this Act to vote and (2) to count such votes.
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> * * * * *
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> (f) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether a person asserting rights under the provisions of this Act shall have exhausted any administrative or other remedies that may be provided by law.

STATEMENT

Section 5 of the Voting Rights Act, as amended, 42 U.S.C. (Supp. V) 1973c, bars a state or political subdivision covered by the Act from administering

"any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964," without obtaining preclearance. To do so it must carry the burden, in a declaratory judgment action before a three-judge district court in the United States District Court for the District of Columbia, of establishing that the proposed change does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color. Alternatively, the jurisdiction may submit the change to the Attorney General, and implement it if the Attorney General has not objected to it within 60 days after its submission, or has affirmatively indicated that he will not object.

In November 1970, the Board of Supervisors of Warren County, Mississippi, submitted a county redistricting plan to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. (Supp. V) 1973c. The new plan was to replace the plan which had been in effect in that county since 1929. On April 4, 1971, after receiving additional information,[3] the Attorney General objected to the plan on

[3] After the United States brought suit, the Board filed a motion to dismiss, contending that the Attorney General's objection came more than 60 days after the original submission, and, thus, was not timely under Section 5. The United States argued that the submission was not complete until February 3, 1971, because earlier submissions contained inaccurate racial population statistics. The district court carried the motion with the case, and disposed of it by granting summary judgment in favor of the United States on June 19, 1975 (App., *infra*, p. 13a).

the ground that statistics submitted by the Board were inaccurate, and, therefore, a substantive determination could not be made. The Board nevertheless held primary and general elections in August and November 1971, respectively, pursuant to the 1970 plan. The Board had not filed a suit in the District Court for the District of Columbia for a declaratory judgment that the plan did not have the purpose or effect of denying or abridging the right to vote on account of race or color.

Appellees sought reconsideration of the Attorney General's objection, and on February 13, 1973, after sufficient data had been received, the Attorney General refused to withdraw the objection of April 4, 1971, on the ground that the 1970 plan would fragment areas of black population concentrations.[4]

[4] Under Mississippi law (Mississippi Code Ann., § 23-5-11 (1972)), the Warren County Board of Supervisors has responsibility for setting the boundaries of the five election districts in the county. The voters of each district elect one member of the five-member board. According to 1970 census figures, blacks, who represent 41.1% of the total population of Warren County and are 38.5% of the voting age population, are primarily concentrated in Vicksburg and immediately north of Vicksburg.

Evidence adduced at the hearing on the plans submitted to the district court showed that the 1970 plan to which the Attorney General objected used irregularly shaped lines to divide the black concentration among all five supervisor districts, leaving no district with a clear black voting majority. Under the plan in effect prior to that time there had been at least one district with a clear black voting majority. (App., *infra*, p. 4a).

On October 31, 1973, the United States filed a complaint in the District Court for the Southern District of Mississippi alleging that the plan was unenforceable and that elections held pursuant to it violated Section 5. Named as defendants were the Board of Supervisors of Warren County, the individual members of the Board, the Election Commission of Warren County and its chairman, the Democratic Executive Committee of the County and the Committee Chairman.

The complaint prayed that a three-judge court be convened and that the court declare the implementation of the 1970 plan violative of Section 5 and enjoin the implementation of any plan that had not received clearance by the Attorney General or the District Court for the District of Columbia, as prescribed by Section 5. In addition, the complaint alleged that the election districts in effect immediately prior to the implementation of the 1970 plan were malapportioned under the Fourteenth Amendment.[5] The United States asked that the court order the Board to develop a new redistricting plan, to require appropriate preclearance of the plan under Section 5, and thereafter to require implementation of the plan according to a court-ordered schedule.

A three-judge court was convened and, on June 19, 1975, granted the motion of the United States for summary judgment and directed the parties to attempt to resolve the issue of relief. After meeting

[5] That allegation was not disputed.

with appellees, the United States filed a proposed order, requesting the three-judge court to require the parties to adhere to the following procedures and timetable:

1. By March 1, 1976, the Board must submit a plan to the Attorney General for review under Section 5;

2. If the Attorney General interposed no objection, elections would be held in accordance with the schedule set forth in the proposed order;

3. If the Board failed to submit a plan to the Attorney General by March 1, or if the Attorney General interposed an objection, the United States would submit a plan to the court. The court, upon consideration of that plan and appellees' response thereto, would adopt a plan.[6]

On July 1, 1975, the three-judge court enjoined the 1975 county elections and ordered the parties to adhere to the procedures and timetable the Attorney General had proposed. In addition, the court held that if the Attorney General objected to a plan which, by March 1, 1976, had been submitted to him, "that plan as submitted to the Attorney General or as further modified by the defendants shall be submitted to this Court." The court would then adopt a plan (App., *infra*, pp. 16a-17a).

[6] The United States also proposed that if, in the Attorney General's evaluation of the Board's plan, the Attorney General became aware of any Fourteenth Amendment one-man one-vote infirmities, the United States would report those infirmities to the court and submit a plan. The court, after considering this plan and appellees' response thereto, was to order the implementation of a plan (App., *infra*, p. 17a).

Appellees "informally" submitted two redistricting plans to the Department of Justice on December 24, 1975.[7] On February 9, 1976, the Department informally objected on the ground that it was unable to conclude that either plan would "not have a prohibited racially discriminatory effect in Warren County similar to that perceived in the plan to which the Attorney General previously objected." [8]

On March 11, 1976, the court advised appellees that "inasmuch as the Attorney General has objected to the County's plans on Section 5 grounds, * * * this remains a three-judge case," and the parties should now file proposed plans with the court. The United

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[7] Neither plan had been formally adopted by the Board. In order for a submission to be considered by the Attorney General under Section 5, the jurisdiction must have formally adopted the change. 28 C.F.R. 51.10(a). The parties had agreed that, prior to the deadline of March 1, 1976, appellees could submit a plan for informal consideration, so that the United States could advise them of potential problems.

[8] The plan provided for only one district with a majority black voting age population. The letter of informal objection stated:

> Our evaluation of these redistricting plans indicates that the effect of either plan is to fragment areas of black population and add those fragments to larger areas of white population, thereby minimizing the number of blacks in each district, and thus unnecessarily diluting black voting strength in Warren County. * * * Because these beat [*i.e.*, district] lines do not appear to be drawn because of any compelling governmental need and do not respect population concentrations or considerations of district compactness, we must advise you of our reservations concerning the validity of such plans under Section 5.

States filed two plans, to which appellees filed objections, and the United States, in turn, filed objections to the plan appellees had filed with the court.

Following a hearing, the three-judge district court on May 13, 1976, entered its Findings of Fact, Conclusions of Law and Mandatory Injunction (App., *infra*, pp. 1a-9a). It held that the Board's plan "neither dilutes black voting strength nor is deficient in one-man, one-vote considerations * * * [and] will provide the most efficient operation of the county government in Warren County" (App., *infra*, p. 6a). The court ordered a timetable for holding county elections under the new plan.

THE QUESTION IS SUBSTANTIAL

The three-judge district court in the Southern District of Mississippi did not have jurisdiction to review or adopt the Board's redistricting plan, which had not received prior clearance under Section 5 of the Voting Rights Act, as amended, 42 U.S.C. (Supp. V) 1973c. By so doing, the court below performed a function that has been relegated by statute to the exclusive jurisdiction of the District Court for the District of Columbia.

Section 5 of the Voting Rights Act requires that, prior to implementing any change affecting voting rights since November 1964, jurisdictions which, by operation of Section 4 are covered by the Act, must apply to a three-judge court in the District of Colum-

bia for a declaratory judgment that the change does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color. Alternatively, jurisdictions may implement changes which they have submitted to the Attorney General under Section 5 if he does not interpose an objection within 60 days of the submission. Reapportionment and redistricting plans are subject to the preclearance procedures of the Voting Rights Act, *Georgia* v. *United States*, 411 U.S. 526, and the procedures established by the Act are constitutional exercises of Congress' power to enforce the Fifteenth Amendment. *South Carolina* v. *Katzenbach*, 383 U.S. 301.

This suit, brought by the United States to enjoin the enforcement of appellees' redistricting plan because of appellees' failure to obtain Section 5 preclearance, was a suit brought "under" Section 5 and, thus, was properly heard by the three-judge court in the Southern District of Mississippi. *Allen* v. *State Board of Elections*, 393 U.S. 544, 561-563; *Georgia* v. *United States*, *supra*. However, the Court has held that in such a suit a local district court (*i.e.*, one other than the District Court for the District of Columbia) may determine only whether a proposed change is subject to Section 5 and is empowered to do no more than prevent the implementation of a covered change without prior approval by the District Court for the District of Columbia or the Attorney General. *Perkins* v. *Matthews*, 400 U.S. 379, 385. As the Court there noted (*ibid.*):

> What is foreclosed to such district court is what Congress expressly reserved for consideration by the District Court for the District of Columbia or the Attorney General—the determination whether a covered change does or does not have the purpose or effect "of denying or abridging the right to vote on account of race or color."

Similarly, in reversing *per curiam* a determination by a local three-judge court that state reapportionment plans were not subject to the preclearance procedures of Section 5, this Court held in *Connor* v. *Waller*, 421 U.S. 656, that "[t]he District Court accordingly also erred in deciding the constitutional challenges to the Acts based upon claims of racial discrimination." See also *Allen* v. *State Board of Elections*, *supra*, 393 U.S. at 570; *Bond* v. *White*, 508 F.2d 1397, 1400 (C.A. 5); *Pitts* v. *Carter*, 380 F. Supp. 4 (N.D. Ga.) (three-judge court), on remand to single judge, 380 F. Supp. 8 (N.D. Ga.), reversed *sub nom. Pitts* v. *Busbee*, 511 F. 2d 126 (C.A. 5), on remand, 395 F. Supp. 35 (N.D. Ga.); *Moore* v. *Leflore County Board of Election Commissioners*, 351 F. Supp. 848, 851 (N.D. Miss.).

Thus, the court below reached the limits of the jurisdiction when it entered summary judgment in favor of the United States and enjoined, for lack of preclearance under Section 5, implementation of the redistricting plan to which the Attorney General had interposed an objection.[9] It follows that, contrary to

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[9] This Court noted last Term in *Beer* v. *United States*, No. 73-1869, decided March 30, 1976, slip op. 8, that Section 5

the position below of both the United States and the appellees in this Court, the district court did not have jurisdiction to consider the Fifteenth Amendment merits of any redistricting plan, whether proposed by the United States or appellees.[10]

Such a procedure would invite circumvention of Section 5. For, instead of seeking preclearance in the District of Columbia court, or from the Attorney General, covered jurisdictions could, as in this case, simply implement changes in voting procedures in order to induce a suit before a local three-judge district court to restrain their violation of Section 5. Then, in that suit, they could seek judicial approval of the changes under the Fifteenth Amendment, thereby completely escaping Section 5's preclearance requirements.

The Court's recent decision in *East Carroll Parish School Board and East Carroll Parish Police Jury* v. *Marshall*, No. 73-861, decided March 8, 1976, is not to the contrary. In *East Carroll*, the Court noted that a plan ordered by a district court in the course

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does not provide a remedy for voting procedures existing prior to November 1964. Accordingly, the United States no longer seeks such orders in cases it brings solely under Section 5. See *United States* v. *Grenada County, Mississippi*, No. WC 75-44 K (N.D. Miss.).

[10] The jurisdictional question is properly raised in this Court, *Clark* v. *Paul Gray, Inc.*, 306 U.S. 583, 588, and the responsibility of any appellate court to correct jurisdictional errors is not altered by the fact that the parties and the trial court assumed that jurisdiction was proper. *Potomac Passengers Assn.* v. *Chesapeake & Ohio Ry. Co.*, 520 F. 2d 91, 95, n. 22 (C.A. D.C.).

of a private reapportionment suit does not require submission under Section 5 (slip op. 3-4, n. 6):

> [C]ourt-ordered plans resulting from equitable jurisdiction over adversary proceedings are not controlled by § 5. * * * Since the reapportionment scheme was submitted and adopted pursuant to court order, the preclearance procedures of § 5 do not apply.

The three-judge court here, convened solely to enforce compliance with Section 5, did not have jurisdiction to order the implementation of any plan. *Perkins* v. *Matthews, supra; Connor* v. *Waller, supra.* Thus, the question whether the plan adopted by the court was a "court-ordered" plan, not subject to Section 5, does not arise. Moreover, *East Carroll* was not a Section 5 compliance suit. It would be anomalous indeed if, in a suit by the United States to remedy a failure to comply with Section 5, a local district court could authorize a covered jurisdiction to circumvent the operation of the statute by adopting a voting change which had not been precleared.

CONCLUSION

For the foregoing reasons, the Court should note probable jurisdiction and reverse and remand the case for entry of an order limited to an injunction against the implementation of any redistricting plan which has not received clearance under Section 5.

Respectfully submitted.

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OCTOBER 1976.

APPENDIX

IN THE
UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

Civil Action No. 73W-48(N)

[Filed May 13, 1976, Southern District of Mississippi, Harvey G. Henderson, Clerk]

UNITED STATES OF AMERICA, PLAINTIFF

v.

THE BOARD OF SUPERVISORS OF WARREN COUNTY, MISSISSIPPI, ET AL., DEFENDANTS

FINDINGS OF FACT, CONCLUSIONS OF LAW and MANDATORY INJUNCTION DIRECTING ELECTION

A hearing was held in the above-named matter on April 29, 1976. After consideration of the evidence presented at that hearing, the arguments of counsel and the submitted briefs, the court adopts the apportionment plan submitted by the Warren County Board of Supervisors and directs that a new election process to fill the offices affected should be promptly held.

I. Apportionment

At the outset of this hearing the court was presented with three apportionment plans: two by the Government and one by the Warren County Board

of Supervisors. The court did not consider itself bound to choose between these three plans but proceeded on the premise that if Fourteenth and Fifteenth Amendment protections had not been accorded by any plan proposed, the court could have instituted its own plan or modified any of the three plans submitted. The court did, however, conclude from the face of the plans that only Plan 2 submitted by the Government should be considered.[1]

The plan submitted by Warren County Board of Supervisors was drawn taking into consideration *only* five elements: (1) road mileage, (2) population, (3) land area, (4) existing voting precincts, and (5) 1970 U.S. census enumeration district boundaries within the city. The Board of Supervisors' expert witness testified that the racial makeup of the city and the county was not considered during the drafting of the original Board of Supervisors' plan. On the other hand, this same expert testified that Plan 2 submitted by the Government appeared to have been constructed so as to maximize black voting strength in at least one of the five districts. On cross examination, the witness admitted he had no

[1] At the court's direction, the Government's Plan 1 was not the subject of any evidence taken during this hearing. This plan drew two districts entirely within the city limits of Vicksburg. Because of the substantial county responsibilities of the Board of Supervisors, the court determined that the parties should concentrate their proof on Government Plan 2 and the Board of Supervisors' plan, in both of which all proposed districts embraced urban and rural areas. Neither party objected to this procedure.

knowledge of the Government's actual intent in fixing the configuration of the districts, but was relying solely upon the placement of district boundary lines and his analysis of the racial effect of such placement.

The Government assailed the Board of Supervisors' plan on three grounds: (A) it is deficient in the one-man, one-vote concept; (B) it has diluted black voting strength; and (C) there should be no substantial consideration given to the equalization of road mileage. The court considered all three attacks before deciding to accept this plan.

A. One-Man, One-Vote

Chapman v. *Meier*, 95 S.Ct. 751 (1975), requires that court-ordered apportionment plans not allow a significant variation from the ideal population size of each district. The overall variation in predicted voting age population in the Board of Supervisors' plan is ±7.3%. Although this is a larger variation than is included in either of the Government plans, it is in the order of only 200 to 300 predicted potential voters in the district with the largest variance. The court concludes that this is not significant enough to require the modification of this plan. All three plans are drawn with census figures now 6 years old. Although this appears to be the best information available, the estimated voting age population projection could contain numerical errors of a substantial order. In addition, this minor variation in projected voters derives some justification from the

attempt of this plan to balance other considerations including road mileage and total area.

B. Dilution

The Government argues that *Beer* v. *United States*, 44 U.S.L.W. 4435 (U.S. March 30, 1976), would condemn as retrogressive the adoption of a plan that reduces the number of districts containing black voting age majorities. The Government points out that the invalid apportionment plan now in effect in Warren County includes three districts with majority black population—two of which contain black voting age population majorities of 60.2% and 50.5%.[2] The plan suggested by the Warren County Board of Supervisors provides for only one district with a majority black voting age population. The Government claims the adoption of this plan would be *per se* retrogressive and, therefore, its adoption is proscribed by *Beer*. *Beer*, however, is distinguishable. It involves § 5 of the Voting Rights Act and relies on the language of that statute for its holding.

More significantly, the court does not consider the plan it adopts to violate the spirit of *Beer*. Obviously the districts as now laid out must be reapportioned to meet one-man, one-vote requirements. Such reapportionment plans, however, cannot include districts which have been gerrymandered either to maximize or to minimize the racial composition of a particular

[2] Five tenths of one percent in this district equates with less than 25 people.

district. Gilbert v. Sterret, 509 F.2d 1389, 1394 (5th Cir. 1975); Turner v. McKeithen, 490 F.2d 191, 197 (5th Cir. 1973). In redistricting to equalize numbers of voters, other considerations, such as equalization of road mileage and area, were apportionately integrated in producing the district lines as drawn. The results are not significantly dilutive of black voting strength. Under the plan adopted, blacks in Warren County will have a 60% total population majority in one of the five districts and a population minority of over 40% in two others. The majority district will have a majority black voting age population and in the other two districts the black voting age population will approximate 40%. The Board's plan originally was drawn without regard to race. In future general elections where there might be three candidates (Democrat, Republican, Independent), blacks would have a realistic opportunity of electing representatives from three districts with their plurality strength. The court determines this plan to be fair for both Fourteenth and Fifteenth Amendment purposes. It will not lessen the opportunity of black citizens of Warren County to participate in the political process and elect officials of their choice.

C. Equalization of Road Mileage

We reject the Government's argument that road mileage equalization should be a *de minimis* consideration in the drawing of this reapportionment plan. *Howard* v. *Adams County Board of Supervisors*, 453 F.2d 455 (5th Cir. 1972), recognized the equalization of road mileage as a legitimate consideration.

The Government argues, however, that since road mileage has not been equalized in Warren County for approximately the past 50 years, it should not now be a legitimate consideration. If this intends to urge that the errors of past officials in failing to seek equalization bind the present citizens by waiver or estoppel, it is not well taken. Any court apportionment plan should take into consideration every factor which will make county government in Warren County operate efficiently. The equalization of road mileage will substantially contribute to that efficiency since one of the major duties of the Board of Supervisors is to care for county roads.

Summary

It is the opinion of this court that the plan submitted by the Warren County Board of Supervisors neither dilutes black voting strength nor is deficient in one-man, one-vote considerations. The plan will provide the most efficient operation of the county government in Warren County. For these reasons, this court adopts the apportionment plan submitted by the Warren County Board of Supervisors.

II. Election

The existing members of the Board of Supervisors, justices of the peace, and constables of Warren County are holdovers. It is imperative that the right of the people of Warren County to elect officials of their choice not be further delayed. The time and

expense involved in conducting an election under the processes provided for by Mississippi law prohibit reliance on all of those procedures. To this end, we order that elections be held according to the following process and schedule:

Upon this order becoming final, the election commission shall direct the Circuit Clerk to conform the poll books to the new district lines within 3 weeks. *See* Miss. Code Ann. § 23-5-11 (1972). After the poll books have been corrected, the Election Commission shall publish in a newspaper of general circulation in Warren County, for 3 consecutive weeks, notice of the upcoming election and the newly drawn districts. *See id.* § 19-3-1. This same notice shall be posted for the same period of time on the public bulletin board maintained at the Warren County courthouse. Upon completion of the period of publication and posting, which shall occur 21 days from the date of first publication and posting, candidates shall have 30 days in which to file qualifying petitions and affidavits and pay appropriate assessments as hereinafter particularized. *Cf. id.* § 23-5-1. Petitions shall include 50 signatures of registered electors residing in the candidate's district and shall be filed with the Circuit Clerk. *Cf. id.* § 23-5-3. Although Mississippi law only applies the 50-signature petition requirement to Election Commission candidates the court considers that, absent a party primary, the requirement of these petitioning signatures is appropriate for all offices involved. The Corrupt Practices Act affidavit required by state law shall also be filed within this 30-day

period with the Circuit Clerk. *See id.* § 23-3-3 through -7. The assessments provided for in Miss Code Ann. § 23-1-33(d) and (e) shall be paid by each candidate for any office covered hereby to the County Election Commission within the same 30 days. *See id.* § 23-1-35. Upon the expiration of this 30-day period, the Circuit Clerk shall turn over the petitions and affidavits to the Election Commission. Within 10 days of the receipt of these items, the Election Commission shall verify each petition, affidavit, the filing of the required fee, and the statutory qualifications of each candidate for the office petitioned for, and certify the list of qualified candidates. *See id.* § 23-5-197.

The election shall be held as soon thereafter as procedures required will reasonably permit. Ballots will be printed and distributed and the election conducted in accordance with all provisions of Mississippi law not inconsistent with this order. *See id.* § 23-5-99 through -169. If no candidate receives a majority of votes in that election, the names of the two candidates having the highest number of votes shall be resubmitted to the voters in a run-off balloting 2 weeks after the first balloting. *Id.* § 23-5-303. All candidates receiving a majority of votes shall be declared elected.

The term of office covered by this procedure shall begin 30 days after the runoff election and shall extend until the next regularly elected officials take office. This is a one-time procedure only. Subsequent regular elections in these districts will be conducted in accordance with Mississippi law. Any of the time

periods discussed herein may be extended up to a maximum of 3 weeks to enable the special election or runoff to coincide with any regularly scheduled county-wide election.

This the 13 day of May 1976.

/s/ Charles Clark
United States Circuit Judge

/s/ Dan M. Russell, Jr.
United States District Judge

/s/ Walter L. Nixon, Jr.
United States District Judge

IN THE
UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

Civil Action No. 73W-48(N)

[Filed Jun. 2, 1976, Southern District of Mississippi, Harvey G. Henderson, Clerk]

UNITED STATES OF AMERICA, PLAINTIFF

v.

THE BOARD OF SUPERVISORS OF WARREN COUNTY, MISSISSIPPI, ET AL., DEFENDANTS

SUPPLEMENTAL ORDER CLARIFYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND MANDATORY INJUNCTION DIRECTING ELECTION

In United States v. Warren County (May 13, 1976), this court ordered a compacted election schedule which should commence upon the opinion becoming final. The Warren County Election Commission has requested this court to clarify its intended commencement date. Our decision issued May 13, 1976, will not be final until the expiration of the 60-day period within which an appeal may be taken or an earlier waiver of that right. If an appeal is taken, our decision will not become final until that appeal has run its course before the Supreme Court of the United States. When that opinion has become final

as outlined next above, the time periods provided in our previous opinion for the election ordered in Warren County, Mississippi, shall begin to run.

The Warren County Election Commission also requested amplification of the court's opinion concerning the application of § 5 of the Voting Rights Act, payment of costs and attorneys' fees. "[C]ourt ordered plans resulting from equitable jurisdiction over adversary proceedings are not controlled by § 5." East Carroll Parish School Board v. Marshall, 44 U.S.L.W. 4320, 4321 n.6 (U.S., March 8, 1976). Therefore, changes in precincts and places for holding elections made necessary by the changes in district lines ordered by our May 13, 1976 opinion are not subject to the submission and United States Attorney General approval requirements of § 5.

The Board of Supervisors conceded in its response to the Election Commission's motion that it would pay all reasonable costs and expenses incurred by the Commission in complying with our May 13, 1976 order. Therefore, there is no costs controversy requiring any amplification of our original opinion. The Board of Supervisors in its answer to the Commission's motion points out that the attorneys for the Election Commission have not presented a specific request to the Board of Supervisors regarding attorneys' fees. Although we specifically pretermit whether the resolution of that conflict would ever be

jurisdictionally appropriate in this action, it is clear that the possible future attorneys' fees controversy is not yet ripe for judicial intervention.

/s/ Charles Clark
United States Circuit Judge

/s/ Dan M. Russell, Jr.
United States District Judge

/s/ Walter L. Nixon, Jr.
United States District Judge

IN THE
UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

Civil Action No. 73W-48(N)

[Filed Jul. 1, 1975, Southern District of Mississippi, Robert C. Thomas, Clerk]

UNITED STATES OF AMERICA, PLAINTIFF

v.

THE BOARD OF SUPERVISORS OF WARREN COUNTY, MISSISSIPPI, ET AL, DEFENDANTS

INJUNCTION ORDER

Upon memoranda and oral argument of counsel the Motion for Summary Judgment served by the plaintiff on April 17, 1975 was granted on June 19, 1975. In view of the unique blend of Fourteenth Amendment (one-man-one-vote) and Fifteenth Amendment (dilution of racial voting strength) problems inherent in this cause, counsel for both plaintiffs and defendants were directed by the Court to confer concerning the appropriate remedy. A report of that conference is now on file. Based on the foregoing the Court finds that the primary election scheduled in Warren County, Mississippi, for August 5, 1975, the subsequent run-off election, if any, and the general election scheduled for November 4, 1975 with respect to the offices of

County Supervisor, Justice of the Peace, and Constable cannot be held as scheduled without abridging rights guaranteed by the Fourteenth and Fifteenth Amendments to the Constitution of the United States and the court having considered the information generated by the parties as evidenced in the Report heretofore filed, it is hereby ORDERED, ADJUDGED, and DECREED that the holding of the 1975 primary and general elections for the positions of Supervisors of Warren County, Justices of the Peace of Warren County, and Constables for Warren County as provided by laws of the State of Mississippi are hereby stayed and postponed subject to the completion of the following requirements:

1. Defendants shall, no later than March 1, 1976, submit to the Attorney General for review under Section 5 of the Voting Rights Act of 1965, a plan for the redistricting of Warren County into five single member supervisor districts, which plan shall satisfy the requirements of the Fourteenth and Fifteenth Amendments to the Constitution of the United States.

2. The United States shall have 60 days within which to review the plan in accordance with Section 5 of the Voting Rights Act of 1965 and the guidelines promulgated under Section 5 of the Voting Rights Act of 1965, 28 C.F.R. § 51 *et. seq.*, provided however such plan shall be given preferential and expedited review by the Attorney General.

3. Immediately upon making a determination that he will not interpose an objection to the plan submitted by the defendants, the Attorney General will

so notify the defendants and the Court. Candidate qualification periods and the elections for Warren County Supervisors, Justices of the Peace, and Constables which were postponed, shall be held under such plan in accordance with the following schedule:

A. Appropriate public notice that the qualifying period for candidates running in the party primary elections will be opened shall be given promptly. Such period shall commence no later than 10 days after defendants receive notice of the failure of the Attorney General to object, and shall remain open for 15 days.

B. Primary elections shall be held on the first Tuesday following a period of 60 days which shall be measured from the end of the qualifying period described in subparagraph A, above.

C. If no candidate in a party primary described above shall receive a majority of the votes cast for the office for which he is a candidate, a run-off primary for such office shall be held three weeks after the date of the primary, in the manner provided for in Title 23, Section 3-69 of the Code of the State of Mississippi.

D. The qualifying period for independent candidates for the general election shall begin on the day following the primary election, or if required, the run-off primary election, whichever is later, and shall end 15 days thereafter.

E. The general election for County Supervisors, Constables, and Justices of the Peace shall be held on the first Tuesday following a period of 60 days, which period shall be computed from the end of the qualifying period described in subparagraph D, above.

F. All other procedures necessary to conduct the elections provided for herein and not specified above shall be scheduled and performed as nearly as possible in conformity with election practices and procedures specified by Mississippi law but in such a manner so as to facilitate the holding of these postponed elections.

4. In the event that the defendants either fail to submit a plan for review under Section 5 of the Voting Right Act by March 1, 1976, or the Attorney General interposes an objection to the plan submitted by the defendants, plaintiff shall submit to this Court a plan, with appropriate supporting data, to redistrict Warren County into five single-member districts and the defendants shall have 10 days to show cause why the plan proposed by the plaintiff is deficient in any respect and should not be implemented, and if a plan submitted to the Attorney General by defendants has been objected to, that plan as submitted to the Attorney General or as further modified by the defendants shall be submitted to this Court. The Court, upon consideration of the plan submitted by plaintiff and defendants' response there-

to shall adopt a plan to be implemented by the defendants and the defendants shall hold elections for County Supervisors, Justices of the Peace, and Constables, according to the schedule described in paragraph 3, above, provided that the schedule of times shall commence with the date of the Order of the Court instead of the date of the Attorney General's failure to object described in paragraph 3.

5. If the Attorney General should be of the opinion that the plan submitted to him pursuant to Section 5 of the Voting Rights Act of 1965 should not be objected to thereunder, but contains infirmities with respect to the one-man, one-vote requirements of the Fourteenth Amendment, the plaintiff shall immediately report such infirmities to the Defendants and the parties shall attempt to resolve the problems involved. If no such resolution is possible, the impasse shall be reported to the Court and Plaintiff shall submit a plan, along with supporting data, which will reapportion the County within Fourteenth Amendment requirements. The defendants shall have 10 days to show cause why the plan proposed by the plaintiff is deficient with respect to the Fourteenth Amendment and should not be implemented. The Court, after considering plaintiff's plan and defendants' response, shall order a plan to be implemented for the holding of the election for County Supervisors, Justices of the Peace, and Constables according to the schedule described in paragraph 3, above, provided that the schedule of times shall commence with the date of the Order of the Court instead of the

date of the Attorney General's failure to object described in paragraph 3.

6. The terms of those persons presently holding office in Warren County as County Supervisor, Justices of the Peace, and Constable, shall be extended until their successors are elected under the provisions of the Order of the Court, in the manner provided for by Title 23, Section 5-93 of the Code of the State of Mississippi.

7. The defendants shall provide appropriate notice of the entry of this Order to the public, and shall make a copy thereof available for public inspection during usual office hours. The Court shall retain jurisdiction of this matter for all purposes.

IT IS SO ORDERED:

This 1st day of July, 1975.

/s/ Charles Clark
Judge
United States Court of Appeals

/s/ Dan M. Russell, Jr.
Judge
United States District Court
Southern District of Mississippi

/s/ Walter L. Nixon, Jr.
Judge
United States District Court
Southern District of Mississippi

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

Civil Action No. 73W-48(N)

[Filed Jul. 19, 1976, Southern District of Mississippi, Harvey G. Henderson, Clerk]

UNITED STATES OF AMERICA, PLAINTIFF

vs.

WARREN COUNTY, MISSISSIPPI, ET AL., DEFENDANTS

ORDER

This cause is before the Court on the plaintiff's Motion to Amend Judgment, and the Court, being fully advised in the premises, finds that as a necessary adjunct to its decision of May 13, 1976, ordering the reapportionment of Warren County, Mississippi, and subsequent special elections, and in order to effectuate the prescribed expedited elections it is necessary that certain precinct lines and polling places be changed without the delays entailed by the submission and approval provisions of § 5 of the Voting Rights Act. However, the Court further finds that any future or subsequent precinct and polling place changes must be submitted to the United States Attorney General for approval under § 5.

It is therefore ordered that the parties shall immediately confer for the purpose of reaching an agreement on the necessary changes in precincts and polling places for the expedited special election only.

In the event that the parties are unable to reach such an agreement, each shall within 20 days of the date of this Order submit to this Court their respective written proposals, with all necessary documentation, including maps.

SO ORDERED, this the 10th day of July, 1976.

/s/ Charles Clark
United States Circuit Judge

/s/ Dan M. Russell, Jr.
United States District Judge

/s/ Walter L. Nixon, Jr.
United States District Judge

IN THE
UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

Civil Action No. 73W-48(N)

[Filed Jul. 9, 1976, Southern District of Mississippi, Harvey G. Henderson, Clerk]

UNITED STATES OF AMERICA, PLAINTIFF

v.

THE BOARD OF SUPERVISORS OF WARREN COUNTY, MISSISSIPPI, ET AL., DEFENDANTS

NOTICE OF APPEAL

Please take notice that the United States of America, plaintiff in this action, hereby appeals to the United States Supreme Court the Findings of Fact, Conclusions of Law and Mandatory Injunction Directing Election, of the three-judge District Court entered on May 13, 1976. The appeal is taken pursuant to 28 U.S.C. Section 1253.

/s/ Robert E. Hauberg
ROBERT E. HAUBERG
United States Attorney

CERTIFICATE

I, the undersigned, Robert E. Hauberg, United States Attorney, hereby certify that I have this day mailed, postage prepaid, a true copy of the foregoing Notice of Appeal to the following:

John W. Prewitt
Prewitt, Braddock & Varner
P.O. Box 750
Vicksburg, Mississippi 39180

Landman Teller
George W. Rogers, Jr.
P.O. Box 22
Vicksburg, Mississippi 39180

This 9th day of July, 1976.

/s/ Robert E. Hauberg
ROBERT E. HAUBERG
United States Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI WESTERN DIVISION

Civil Action No. 73W-48(N)

[Filed Aug. 13, 1976, Southern District of Mississippi, Harvey G. Henderson, Clerk]

UNITED STATES OF AMERICA, PLAINTIFF

v.

THE BOARD OF SUPERVISORS OF WARREN COUNTY, MISSISSIPPI, ET AL., DEFENDANTS

AMENDED NOTICE OF APPEAL

Please take notice that the United States of America, plaintiff in this action, hereby appeals to the United States Supreme Court the Findings of Fact, Conclusions of Law and Mandatory Injunction Directing Election, of the three-judge District Court entered on May 13, 1976, as clarified by the supplemental order of June 2, 1976, and amended by the order signed by the District Court on July 10, 1976 (filed by the Clerk on July 19, 1976). The appeal is taken pursuant to 28 U.S.C. Section 1253.

/s/ Robert E. Hauberg
ROBERT E. HAUBERG
United States Attorney

CERTIFICATE

I, the undersigned, Robert E. Hauberg, United States Attorney, hereby certify that I have this day mailed, postage prepaid, a true copy of the foregoing Amended Notice of Appeal to the following:

John W. Prewitt
Prewitt, Braddock & Varner
P.O. Box 750
Vicksburg, Mississippi 39180

Landman Teller
George W. Rogers, Jr.
P.O. Box 22
Vicksburg, Mississippi 39180

This 13th day of August, 1976.

/s/ Robert E. Hauberg
ROBERT E. HAUBERG
United States Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

Civil Action No. 73W-48(N)

[Filed Sep. 9, 1976, Southern District of Mississippi, Harvey G. Henderson, Clerk]

UNITED STATES OF AMERICA, PLAINTIFF

vs.

WARREN COUNTY, MISSISSIPPI, ET AL., DEFENDANTS

ORDER

This cause is before the Court on the Plaintiff's Motion to Clarify the Court's Order of July 10, 1976. The Court, being fully advised in the premises, finds that the ultimate disposition of this cause will be materially advanced by submission and approval pursuant to Section 5 of the Voting Rights Act of 1965 of the changes in polling places and precinct lines necessitated by the reapportionment plan ordered by this Court on May 13, 1976, that such submission will not unduly delay the special elections ordered by this Court, and that for these reasons Plaintiff's Motion is well taken.

IT IS THEREFORE ORDERED that the above-described changes in polling places and precinct lines be submitted by the Defendants for approval pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c.

SO ORDERED, this the 4th day of September, 1976.

/s/ Charles Clark
United States Circuit Judge

/s/ Dan M. Russell, Jr.
United States District Judge

/s/ Walter L. Nixon, Jr.
United States District Judge

☆ U. S. GOVERNMENT PRINTING OFFICE: 1976 221092 310

In The

Supreme Court of the United States

October Term, 1976

NO. 76-489

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

vs.

BOARD OF SUPERVISORS OF WARREN COUNTY, MISSISSIPPI, ET AL.,
Defendant-Appellees.

Appeal from the Southern District of Mississippi

MOTION TO DISMISS OR AFFIRM AND BRIEF IN SUPPORT THEREOF

JOHN W. PREWITT
Attorney for Defendant-Appellees

COCKLE PRINTING CO., 1822 St. Mary's Ave., Omaha

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In The

Supreme Court of the United States

October Term, 1976

NO. 76-489

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

vs.

BOARD OF SUPERVISORS OF WARREN COUNTY, MISSISSIPPI, ET AL.,

Defendant-Appellees.

Appeal from the Southern District of Mississippi

MOTION TO DISMISS OR AFFIRM AND BRIEF IN SUPPORT THEREOF

MOTION TO DISMISS OR AFFIRM

UNDER Supreme Court Rule 16, Motion by Appellees to dismiss the appeal for failure of a substantial federal question as to Appellant's claims that (1) District Court

lacked jurisdiction to pass on constitutional merits, or (2) to order a new redistricting plan into effect, or (3) that preclearance of the redistricting plan under Section 5 of the Voting Rights Act of 1965 by the Attorney General of plan was necessary.

In the alternative, Appellees move the Court to affirm the final judgment of the Three-Judge Court on the ground that the question raised by Appellant are not of substance and should not require further argument: (1) For reason that the Appellant questions the jurisdiction of the Three-Judge Court, to adopt a redistricting plan, yet, when such action is sanctioned under prevailing authority, particularly where Appellant submitted, without objection of Appellees, a proposed Order, later adopted by the Three-Judge Court, requesting that the Three-Judge Court adopt a redistricting plan. The Appellant is without standing to now complain of this "invited error", if any, under the doctrine of estoppel, (2) For the further reason that the Three-Judge Court had authority and jurisdiction to adopt a redistricting plan where this issue was presented to said Court by the Appellant, without objection by Appellee, and this is true because Appellant made no complaint of such action below but raises "invited error" for the first time here, (3) For further reason that the Three-Judge Panel had jurisdiction of the matter and rightly concluded the matter on what amounted to an agreed Order by both parties, objection thereto is untimely at this juncture.

It is, therefore, respectfully moved that this appeal be dismissed and, in the alternative, that the judgment of the Three-Judge District Court adopting a redistricting plan for Warren County, Mississippi, be affirmed.

Respectfully moved and submitted this 10th day of November, 1976.

BOARD OF SUPERVISORS OF WARREN COUNTY, MISSISSIPPI, ET AL.

By: /s/ John W. Prewitt

Attorney for Appellee Board of Supervisors of Warren County, Mississippi

BRIEF IN SUPPORT OF MOTION TO DISMISS

APPELLEES' VIEW OF STATUTORY AUTHORITY

Appellant is cognizant of requirements of provisions of the Voting Rights Act,[1], which the Federal Congress enacted to protect voting rights of its citizens in certain states, and as it is applied to a local governmental unit. Yet it appears clear under Section 12 (d) and (f) of this Act[2] that the Congress had in mind the situation presented here, by inserting in subsection (d) the phrase "or other order" in protecting the voting rights under the act. The orders of the three-judge district court[3] would fit the category of "other order(s)" as provided by the act. Subsection (f) gives the District Court jurisdiction over such matters.

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PRELIMINARY STATEMENT

The Appellant has reasonably and fairly reconstructed the events occurring in the Court below in its Jurisdictional Statement. However, it is clear from Appellant's State-

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1. Section 5 of the Voting Rights Act of 1965, 79 Stat. 439, as amended, 42 U. S. C. (Supp. V) 1973C.
2. Section 12 (d) and (f) of the Voting Rights Act of 1965, 79 Stat. 444, 42 U. S. C. 1973; (d) and (f).
3. May 13, 1976 (p. 1a Appendix Appellant's Jurisdictional Statement) and July 1, 1975 (p. 13a Appendix Appellant's Jurisdictional Statement).

ment[4] that the Appellant sought relief in the Court below identical to and the same as objection is now being made of. It would appear that the Appellant does not complain of the three-judge district court's jurisdiction in granting summary judgment but when the Appellant invited the Lower Court to commit alleged error, then Appellant's complaint comes too late.[5]

Appellee simply urges that once jurisdiction was properly taken in the principal action by the three-judge court in this case that it could settle all issues, and certainly this is true where the Appellant instigated the very action of which it now complains.

It seems safe to assume that had the Lower Court adopted one of the two (2) plans submitted by the Appellant below that no complaint of such action would have been heard from Appellant.[6]

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ARGUMENT

There is no question that the three-judge court was properly empaneled and had jurisdiction of the parties and

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4. P. 9—Appellant's Jurisdictional Statement wherein the United States requested the Lower Court to adopt a plan, if the parties could not agree on satisfactory plan.
5. **United States v. Hoth**, 207 F. 2d 386 (5th CA 1953); **Chi Sheng Liu v. Halton**, 297 F. 2d 740 (CA 5th 1967); and **Trawick v. Manhattan Life Ins. Co. of New York, N. Y.**, 484 F. 2d 535 (1973).
6. PP. 10-11—Appellant's Jurisdictional Statement wherein Appellant led two (2) plans with Lower Court.

subject matter as pointed out in *Allen v. State Board of Elections,* 393 U. S. 558, 89 S. Ct. 817 (1969) when the Court said:

> "We conclude that in light of the extraordinary nature of the Act in general, and the unique approval requirements of Section 5, Congress intended that disputes involving the coverage of Section 5 be determined by a District Court of three-judges."

When a three-judge court acquires jurisdiction of a case in its entirety, it may exercise jurisdiction to decide other matters raised in the case of which it could not if they were independently presented. Therefore, if the Court has jurisdiction of the principal action then it may exercise ancillary jurisdiction of matters presented therein regardless of any other factor which would ordinarily establish jurisdiction.[7]

Jurisdiction being properly founded in the three-judge court, which was not questioned by Appellant in the Court below, coupled with Appellant's request of the three-judge court to settle the issue of adopting a satisfactory redistricting plan, it is submitted, settles the question of jurisdiction, Appellant submitted an Order requesting that the three-judge court formulate a plan, if the Appellant and Appellees could not submit a plan to the three-judge court satisfactory to both parties, thus having requested that the three-judge court adopt a plan the Appellant cannot complain of such action here, as said three-judge court could

7. **Krippendorf v. Hyde,** 1884, 4 S. Ct. 27, 110 U. S. 276, 28 L. Ed. 145; **State of Iowa v. Union Asphalt & Roadoils, Inc.,** C. A. 8th, 1969, 409 F. 2d 1239; **Compton v. Jesup,** C. C. A. 6th, 1895, 68 F. 263; and cases cited 1 **Barron & Holtzoff** (Wright ed.), § 23n. 22.

under Section 5 enter "such order" as it deemed necessary incident to its jurisdiction, in keeping with the Voting Rights Act.

In *Hannah v. Larche,* 176 F. Supp. 791 (W. D. La.); 177 F. Supp. 816 (W. D. La.); 361 U. S. 910, 80 S. Ct. 1502; Pet. for Rehearing denied October 10, 1960, this Court adopted the rule that a three-judge court could settle all issues submitted both constitutional and non-constitutional.[8]

Where the federal question is substantial, a three-judge court, under the prevailing rule in the Fifth Circuit, in all but exceptional cases, shall decide the federal issue and other issues in the case. *Alabama v. United States,* 314 F. Supp. 1319, 400 U. S. 954, 91 S. Ct. 355; appeal dismissed for want of jurisdiction Dec. 14, 1970.

As far as can be determined the cases cited by Appellant[9] in support of its position are distinguishable from

8. "The principal objection and purpose of a three-judge federal court is to decide the constitutional validity of the Act of Congress sought to be enjoined. But where other issues are presented, as they are here, they too should be decided. The parties readily agree that this is so and that all issues, both constitutional and non-constitutional, are before this court.[6]

   [6] **California Water Service Co. v. City of Redding,** 1938, 304 U. S. 252, 58 S. Ct. 865, 82 L. Ed. 1323; **Davis v. Wallace,** 1922, 257 U. S. 478, 482, 42 S. Ct. 164, 66 L. Ed. 325; **Louisville & Nashville R. Co. v. Garrett,** 1913, 231 U. S. 298, 304, 34 S. Ct. 48, 58 L. Ed. 229."

9. **Georgia v. United States,** 411 U. S. 526; **South Carolina v. Katzenbach,** 383 U. S. 301; **Allen v. State Board of Elections,** 393 U. S. 544, 561-563; **Perkins v. Matthews,** 400 U. S. 379, 385; **Bond v. White,** 508 F. 2d 1397, 1400 (C. A. 5); **Pitts v. Carter,** 380 F. Supp. 4 (N. D. Ga.); **Pitts v. Busbee,** 511 F. 2d 126 (C. A. 5) on remand, 395 F. Supp. 35 (N. D. Ga.); **Moore v. Leflore County Board of Election Commissioners,** 351 F. Supp. 848, 851 (N. D. Miss.).

the one at bar, simply because here the three-judge court had jurisdiction and settled all issues submitted. The Appellant submitted to the three-judge court the issue of adopting a redistricting plan for Appellees.

As the three-judge district court had jurisdiction and adopted a plan, as requested and urged by Appellant, *East Carroll Parish School Board and East Carroll Parish Police Jury v. Marshall,* No. 73-861, decided March 8, 1976, obviates pre-clearance under Section 5 of the Voting Rights Act of 1965.[10]

The case cited[11] by Appellant that the question of jurisdiction is properly raised in this Court are not applicable here, as the cited cases clearly reveal failure, at inception, of jurisdiction in the Lower Court, yet in the instant case you find (1) the three-judge district court clearly had jurisdiction of the principal action, and (2) settled the issue of adopting a constitutionally acceptable plan as requested by Appellant.

Had not the Appellant requested the three-judge court to adopt a plan, then possibly Appellant's position here would be more understandable, but Appellant insisted that the three-judge panel adopt a plan and now complains that the Court acted without authority, which action by Appellant now prevents Complaint of such error, if any, in this

10. **Zimmer v. McKeithen,** 467 F. 2d 1381, 1383 (CA 5 1972) and **Zimmer v. McKeithen,** 485 F. 2d 1297, 1302 N. 9 (CA5 1973) (en banc).

11. Footnote 10 in Appellant's Jurisdictional Statement, **Clark v. Paul Gray, Inc.,** 306 U. S. 583, 588; **Potomac Passengers Assn. v. Chesapeake & Ohio Ry. Co.,** 520 F. 2d 91, 95, n. 22 (C. A. D. C.).

Court. Appellant, even though the United States, cannot complain of error on appeal which it has itself invited.[12]

In *Frischia v. New York Central R. R. Co.,* 279 F. 2d 141 (CA 3rd 1960) wherein a change of position of Defendants as to jurisdiction after trial of case would not be tolerated where Defendant's actions played fast and loose with judicial machinery and deceived the Court. See also *Young v. Handwork,* 179 F. 2d 70, cert. den., 1950, 339 U. S. 949.

—o—

CONCLUSION

From foregoing reasons and authority the Appellees' Motion should be sustained.

Respectfully submitted,

JOHN W. PREWITT,

Attorney for Board of Supervisors of Warren County, Mississippi, et al.

November, 1976

—o—

CERTIFICATE

I, the undersigned, JOHN W. PREWITT, Attorney for the Board of Supervisors of Warren County, Mississippi, et al., certify that I have this day mailed, postage

12. **United States v. Hoth,** 207 F. 2d 386 (5th CA 1953); **Chi Sheng Liu v. Halton,** 297 F. 2d 740 (CA 5th 1967); and **Trawick v. Manhattan Life Ins. Co. of New York, N. Y.,** 484 F. 2d 535 (1973).

prepaid, a true copy of the following Motion to Dismiss or Affirm and Brief in Support of Said Motion to the following:

Robert H. Bork,
Solicitor General,

J. Stanley Pottinger,
Assistant Attorney General,

Brian K. Landsberg,
Judith E. Wolf,
Attorneys,
Department of Justice,
Washington, D. C. 20530

Landman Teller,
George W. Rogers, Jr.
P. O. Box 22
Vicksburg, Mississippi 39180

Frank R. Parker,
233 North Farish St.
Jackson, Mississippi 39201

THIS the 10th day of November, 1976.

/s/ John W. Prewitt

Attorney for Board of Supervisors of Warren County, Mississippi, et al.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-489

UNITED STATES OF AMERICA,
Appellant

v.

BOARD OF SUPERVISORS OF WARREN COUNTY, MISSISSIPPI, ET AL.

On Appeal from the United States District Court for the Southern District of Mississippi

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE IN SUPPORT OF JURISDICTIONAL STATEMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-489

UNITED STATES OF AMERICA,
Appellant

v.

BOARD OF SUPERVISORS OF WARREN COUNTY, MISSISSIPPI, ET AL.

On Appeal from the United States District Court for the Southern District of Mississippi

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE IN SUPPORT OF JURISDICTIONAL STATEMENT

Eddie Thomas, Tommie Lee Williams, James H. Meeks, Charlie Steele, Mrs. Charlie Hunt, and St. Clair Mitchell, black citizens and registered voters of Warren County, Mississippi, respectfully move for leave to file their brief as amici curiae in support of the jurisdictional statement, previously transmitted to the Clerk, in this case. Movants have obtained the consent of the Solicitor General on behalf of the United States as appellant, and the consent of the attorney for the Warren County Board of

Supervisors as appellee. The consent of Mr. Landman Teller as attorney for the Warren County Board of Election Commissioners, as appellee, was requested but refused.[1]

Amicus Eddie Thomas is president of the Concerned Citizens of Vicksburg, a black civil rights and civic improvement organization in Warren County. Amicus Charlie Steele is president of the Vicksburg Branch of the National Association for the Advancement of Colored People, a predominantly black civil rights organization in Warren County. The interest of amici arises from the fact that as voters and as black voters they have an interest in securing a constitutional and equitable county redistricting plan for the election of county officials in Warren County which does not unconstitutionally or inequitably dilute black voting strength and which provides substantial equality of population among the districts. Under the county redistricting plan ordered into effect by the District Court, Mr. Thomas was transferred from previous majority black District 3 (pre-1970) to new majority white District 3, Mr. Williams was transferred from previous majority black District 4 (pre-1970) to new majority white District 3, and Mrs. Hunt and Mr.

[1] When we filed the brief for amici curiae with the Clerk with the consent of the United States and the Board of Supervisors, we were unaware that the Warren County Board of Election Commissioners was separately represented in this appeal. The motion to dismiss or affirm filed by the Board of Supervisors was filed by Mr. John W. Prewitt as "Attorney for Defendant-Appellees." The Board of Election Commissioners has waived filing a response to the Jurisdictional Statement. It is our understanding that the Board of Election Commissioners had no authority to participate and did not participate in the production of the county redistricting plan in controversy, and therefore it may be questioned whether they are a party in interest to this appeal. We understand that the election commissioners' predominant interest is in speedy county elections, which have been stayed by the District Court pending this appeal.

Mitchell were transferred from previous majority black District 2 (pre-1970) to new majority white District 1.

Amici are not parties to and are unrepresented in this action filed by the Department of Justice to enforce Section 5 of the Voting Rights Act of 1965. They are plaintiffs in a subsequent action filed by them on behalf of the class of black citizens and voters of Warren County, *Eddie Thomas, et al.* v. *Warren County Board of Supervisors, et al.*, Civil No. W76-45(N), S.D. Miss., appeal pending (5th Cir.), which presents the same issue presently raised by the United States here, namely, whether the Section 5 three-judge District Court had jurisdiction to order into effect this county redistricting plan, and which also raises the issues of racial discrimination and malapportionment. That action was dismissed on comity and ripeness grounds, and is presently on appeal to the United States Court of Appeals for the Fifth Circuit.

In the Jurisdictional Statement, the United States limits its argument to the contention that the three-judge District Court in Mississippi did not have jurisdiction, in a proceeding to enforce an objection rendered under Section 5 of the Voting Rights Act of 1965, to review or adopt the Board's redistricting plan. The brief of amici curiae makes this contention, but also makes the argument, based on the record in this case, that the plan approved by the three-judge District Court invidiously dilutes black voting strength, effects a retrogression in the position of blacks with respect to their effective exercise of the right to vote, and is malapportioned in comparison with the alternative county redistricting plans presented by the Department of Justice. Thus, even if the Court rejects the contention made by the United States and determines that the three-judge District Court did have jurisdiction to approve the Board's plan and order it into effect, then the Court should examine the court-ordered plan on its merits to determine whether it

meets the strict standards established by this Court in prior decisions for court-ordered redistricting plans.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-489

UNITED STATES OF AMERICA,
Appellant,
v.
BOARD OF SUPERVISIORS OF WARREN COUNTY, MISSISSIPPI, ET AL.

On Appeal from the United States District Court for the Southern District of Mississippi

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BRIEF FOR EDDIE THOMAS, ET AL., AS AMICI CURIAE, IN SUPPORT OF JURISDICTIONAL STATEMENT

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INTEREST OF THE AMICI CURIAE

This brief is being filed with the consent of appellant and appellees, and copies of the letters of consent have been or soon will be filed with the Clerk.

This brief is filed on behalf of Eddie Thomas, Tommie Lee Williams, James H. Meeks, Charlie Steele, Mrs. Charlie Hunt, and St. Clair Mitchell, black citizens and

registered voters of Warren County, Mississippi. Amicus Eddie Thomas is president of the Concerned Citizens of Vicksburg, a black organization in Warren County, Mississippi, concerned with overcoming racial discrimination and achieving equal opportunities for black citizens. Amicus Charles Steele is president of the Vicksburg Branch of the National Association for the Advancement of Colored People, a predominantly black civil rights organization in Warren County. Under the county redistricting plan adopted by the District Court, four of the six amici have been removed from the majority black districts in which they resided prior to the first redistricting in 1970, and have been placed in white majority districts which deprive black voters of the opportunity to elect county officials of their choice.

Amici seek equitable county redistricting in Warren County which provides districts equal in population which do not fragment, dilute, and minimize black voting strength. Subsequent to the final injunction issued by the District Court in this case, amici filed an action in the United States District Court for the Southern District of Mississippi challenging the court-ordered county redistricting plan as beyond the jurisdiction of the three-judge District Court to adopt under Section 5 of the Voting Rights Act of 1965, as racially discriminatory, and as malapportioned. *Eddie Thomas, et al.* v. *Warren County Board of Supervisors, et al.*, Civil No. W76-45(N). On October 21, 1976, the District Court dismissed their action for lack of ripeness, because of the stay order issued by the District Court here, and under the comity doctrine as interference with this proceeding. This action currently is on appeal to the United States Court of Appeals for the Fifth Circuit on the ripeness and comity questions, and is not involved here.

Because the outcome in this action is likely to have a bearing on the action filed by amici (although as non-

parties the outcome would not constitute res judicata or collateral estoppel), amici file this brief to express their contentions that the three-judge District Court lacked jurisdiction to approve the Board's plan, that the plan is malapportioned under equitable standards, and that the plan fragments, dilutes, and minimizes black voting strength in Warren County.

STATEMENT OF THE CASE

Each Mississippi county is divided into five supervisors' districts (sometimes called "beats") for the election of members of the county board of supervisors (the county governing board), justice of the peace, constables, and members of the county board of education. The board of supervisors has the statutory responsibility for redistricting the five supervisors' districts.[1]

In 1970, according to the 1970 Census, three of the five supervisors' districts in Warren County (Districts 2, 3, and 4) were majority black in population.[2] See Table A. Further, all three of these districts were located entirely within the corporoate limits of the county seat of Vicksburg. This districting had been in effect in Warren County since 1929, and there is no evidence that the inclusion of three districts within the Vicksburg city limits caused any special administrative or financial difficulties in county administration.

On August 6, 1970, the Warren County Board of Supervisors adopted a county redistricting plan devised by Comprehensive Planners, Inc. (hereinafter "CPI"), of West Point, Mississippi, a planning firm, realigning the

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[1] Miss. Code Ann. § 19-3-1 (1972); Miss. Code Ann. § 2870 (1956 Recomp.).

[2] U. S. Bureau of Census, 1970 Census of Population, General Population Characteristics: Mississippi, PC(1)-B26, Table 33, p. 26-83 (1971).

Table A. Warren County Redistricting, 1970 and 1976

1. POPULATION OF PRE-1970 DISTRICTS BY RACE
(1970 Census)

District	Total	White	% White	Black	% Black
1	9,827	5,934	60.38%	3,871	39.39%
2	7,566	2,717	35.91%	4,807	63.53%
3	6,217	3,066	49.32%	3,124	50.25%
4	7,539	3,321	44.05%	4,206	55.79%
5	13,832	13,832	82.68%	2,347	16.97%
Totals	44,981	26,474	58.86%	18,355	40.81%

2. POPULATION OF 1976 COURT-ORDERED PLAN DISTRICTS BY RACE

District	Total	White	% White	Nonwhite	% Nonwhite
1	8,843	5,072	57.4%	3,771	42.6%
2	8,749	3,466	39.6%	5,283	60.4%
3	8,946	5,187	58.0%	3,759	42.0%
4	9,002	6,503	72.2%	2,499	27.8%
5	9,441	6,246	66.2%	3,195	33.8%
Totals	44,981	26,474	58.86%	18,507	41.14%

boundaries of all five supervisors' districts. The new plan was an "apple pie" plan. Each of the five districts took in large areas of the county outside Vicksburg and convereged in spoke-like fashion into the City of Vicksburg, slicing up the Vicksburg population and fragmenting it among all five districts.

Subsequently, the Board submitted the new plan to the United States Attorney General for clearance pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c. After requests for additional information which extended the time for objection, the Attorney General on April 4, 1971, objected to the Board's 1970 plan for the reason that the Board had failed to demonstrate that its plan did not have a prohibited racially discriminatory purpose or effect. The objection letter

stated that because of "substantial and apparently irreconcilable discrepancies" between the submitted CPI racial statistics and 1970 Census data, "there is no way to determine . . . whether there is a proscribed discriminatory effect on the basis of race."

On August 23, 1971, and February 13, 1973, after the Board had submitted additional data and suggested changes, the Attorney General refused to withdraw his April 4, 1971 objection, stating in his February 13, 1973 letter that "the effect of the proposed district boundary lines is to fragment areas of black population concentrations, thereby minimizing the total number of black persons residing in each of the districts and diluting black voting strength" without "any compelling governmental need" and without reflecting "population concentrations" or "considerations of district compactness or regularity of shape."

Regardless of the Attorney General's April 4, 1971, Section 5 objection to the 1970 redistricting plan, the Board took the position that the plan remained in effect, and county officials conducted the 1970 county primary and general elections on the basis of the objected-to districts. No blacks were elected to any county office. No action was instituted by the Board in the United States District Court for the District of Columbia to contest the Attorney General's Section 5 objection.

On October 31, 1973, the United States filed its complaint in the United States District Court for the Southern District of Mississippi pursuant to Sections 5 and 12(d) of the Voting Rights Act, 42 U.S.C. §§ 1973c and 1973j(d), and the Declaratory Judgment Act, 28 U.S.C. § 2201, alleging that the 1970 redistricting plan was unenforceable and that the primary and general elections held pursuant to that plan were held in violation of Section 5. The defendants were the Warren County Board of Supervisors and its members, the County Elec-

tion Commission and its chairman, and the County Democratic Executive Committee and its chairmen. The plaintiff sought relief (1) declaring that implementation of the 1970 plan violates Section 5, (2) enjoining the defendants from implementing any election districts different from those in effect on November 1, 1964, without the required Section 5 clearance, and (3) ordering the defendants to develop a new county redistricting plan to be implemented "after the plan is found to be acceptable under the provisions of Section 5 of the Voting Rights Act of 1965" on a schedule set by the District Court.

On January 7, 1974, a three-judge District Court was designated pursuant to the requirements of Section 5 of the Voting Rights Act.

The docket entries indicate that no answer was ever filed by any of the defendants.

On June 19, 1975, the District Court granted summary judgment for the plaintiff and directed the parties to confer concerning the appropriate remedy. On July 1, 1975, the District Court entered an order proposed by the Department of Justice (J.S. App., pp. 13a-18a) which (a) stayed the August primary and November general elections for county officials elected by supervisors' districts and extended the terms of office of the incumbents, and (b) provided for the development of a new plan. The July 1, 1975, order required the defendants "no later than March 1, 1976" to submit to the Attorney General for Section 5 review a county redistricting plan which satisfies Fourteenth and Fifteenth Amendment requirements. The order provided that if the defendants failed to submit such a plan by the required deadline, or if the Attorney General interposed an objection to a submitted plan, then the United States was required to submit to the court a county redistricting plan with "appropriate supporting data" and the defendants were

given 10 days within which to show cause why the Justice Department's plan should not be implemented.

The July 1, 1975 order also provided for review by the Mississippi District Court of any Section 5 objections entered by the Attorney General to the defendants' proposed plan by stating:

> "[A]nd if a plan submitted to the Attorney General by defendants has been objected to, that plan as submitted to the Attorney General or as further modified by the defendants shall be submitted to this Court. The Court, upon consideration of the plan submitted by plaintiff and defendants' response thereto shall adopt a plan to be implemented by the defendants * * *" (J.S. App., pp. 16a-17a).

A schedule was also provided for holding county primary and general elections (1) if no objection was interposed by the Attorney General to the defendants' submitted plan, or (2) under a county redistricting plan adopted by the District Court.

No proposed county redistricting plan was submitted formally by defendants for Section 5 review by the Attorney General by the March 1, 1976 deadline established in the District Court's July 1, 1975 order. However, two draft plans were submitted by the Board to the Attorney General for "informal consideration" by letter of December 24, 1975. Both drafts were simply revisions of the objected-to 1970 plan. The district boundaries outside Vicksburg were left unchanged; only the district boundaries within Vicksburg were somewhat altered. On February 9, 1976, the Attorney General objected to both drafts for dilution of black voting strength:

> "[O]n the basis of our analysis we are unable to conclude that either Draft A or Draft B will not have a prohibited racially discriminatory effect in Warren County similar to that perceived in the plan to which the Attorney General previously objected.

> Our evaluation of these redistricting plans indicates that the effect of either plan is fragment areas of black population and add those fragments to larger areas of white population, thereby minimizing the number of blacks in each district, and thus unnecessarily diluting black voting strength in Warren County . . . Because these beat lines do not appear to be drawn because of any compelling governmental need and do not respect population concentrations or considerations of district compactness, we must advise you of our reservations concerning the validity of such plans under Section 5."

Defendants having failed to comply with the District Court's order, the Department of Justice on March 30, 1976 filed two alternative county redistricting plans with the District Court. On March 26, 1976, CPI submitted a county redistricting plan to the Board of Supervisors which was identical to Draft A objected to by the Attorney General. Apparently, the Board of Supervisors subsequently sent copies of this new CPI plan to the District Judges and to the Justice Department attorneys, but according to the docket entries the 1976 Board plan (Draft A) was never filed with the Clerk of the District Court nor admitted in evidence in the case. On April 6, 1976, the Department of Justice filed with the District Court objections to the defendants' proposed p'an contending that the plan fragmented areas of black population, minimized the number of blacks in each district, and unnecessarily diluted black voting strength in Warren County.

Plan 1 submitted by the Department of Justice provided two black majority districts which were 64.3 and 55.8 percent black, and substantially equalized population among the districts by a total deviation of 5.5 percent (maximum variances of +2.5 percent and -3.0 percent). Two districts (District 3 and 4) were entirely within Vicksburg. Plan 2 also provided two black majority districts which were 70.1 and 60.2 percent black with a total deviation from population equality of only 3.95 percent (maximum variance of +2.12 percent and -1.83 percent). Each district of Plan 2 included both rural and urban areas of Warren County. Both Justice Department plans were based exclusively on Census enumeration districts.

The plan submitted by the Board of Supervisors provided only one black majority district which was 60.4 percent black; the remaining districts were all majority white. Further, the Board plan provided a greater total deviation and less equality of population among the districts than either Justice Department plan, with a total deviation of 7.69 percent (maximum variances of +4.95 percent and -2.74 percent).[3]

After a hearing on April 29, 1976, the three-judge District Court on May 13, 1976, issued its findings of fact, conclusions of law, and mandatory injunction (J.S. App., pp. 1a-9a) adopting the Board's plan as a court-ordered county redistricting plan for Warren County.

However, insofar as the docket entries and record reveal, no judgment "set forth on a separate document" as required by Rule 58, F.R.Civ.P., was ever entered. On June 2, 1976, the District Court entered an order automatically staying implementation of the court-ordered plan pending appeal (J.S. App., pp. 10a-12a).

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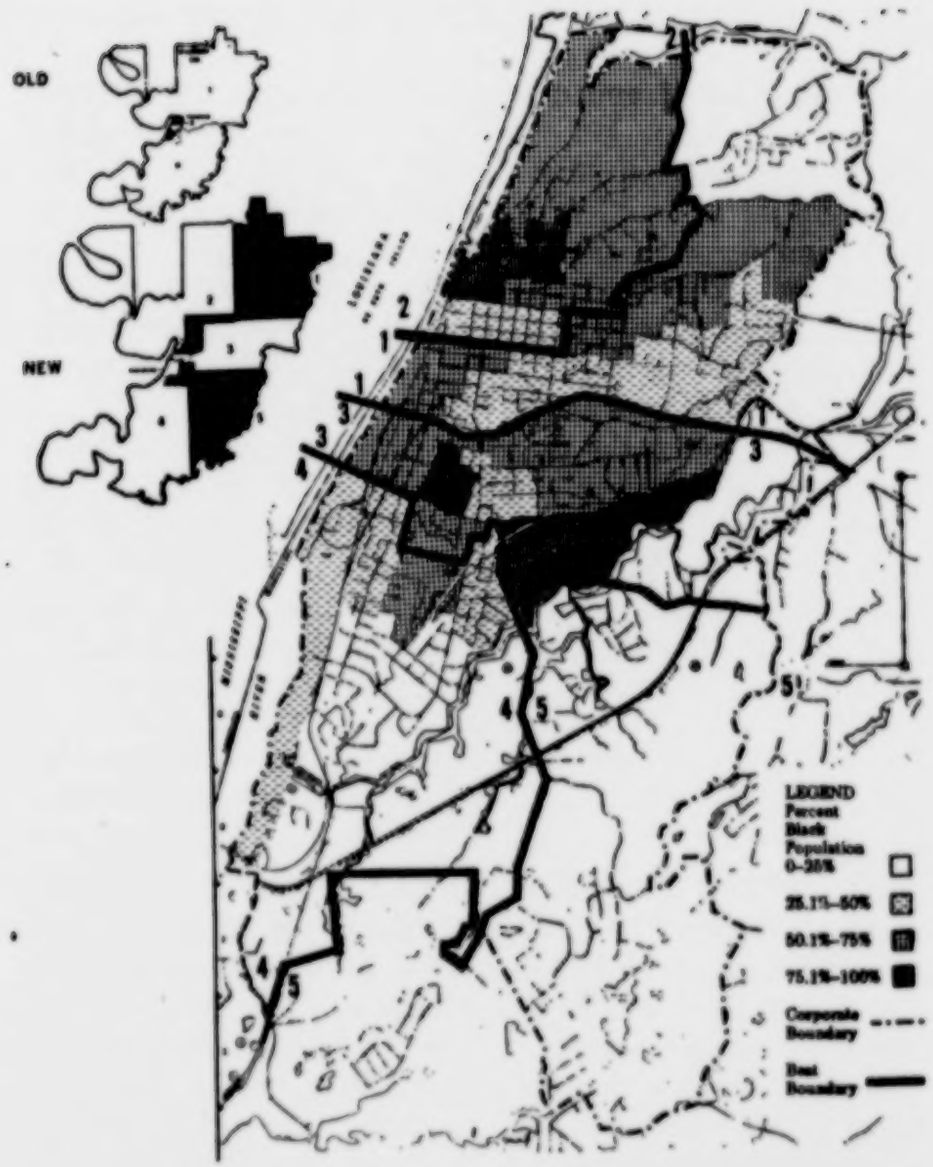
[3] The District Court opinion erroneously states: "The overall variation in predicted voting age population in the Board of Supervisors' plan is ±7.3%" (J.S. App., p. 3a). This statement is erroneous on two counts. First, the figure given according to the defendants' plan is for total population, not voting age population (Defendants' Plan, p. 3). Second, the 7.3 percent figure is wrong. The defendants' plan states a maximum plus variance of 4.9 percent and a maximum minus variance of 2.7 percent (*id.*), and then concludes that the "overall spread" is 7.3 percent (*id.*), which is either poor addition or a typographical error.

According to the 1970 Census, Warren County, Mississippi, has 44,981 persons, of whom 26,474 are white (58.85 percent), 18,355 are black (40.81 percent), and 152 are of other races (0.34 percent).[4] Blacks are most heavily concentrated in the City of Vicksburg, which contains 12,568 black persons, or 68.47 percent of the total black population of Warren County.[5]

The Board plan adopted by the three-judge District Court is an "apple pie" plan in which each of the five districts converge in long, narrow corridors on the heavy black population concentration in Vicksburg, fragment it, and slice it up among all five districts, thus minimizing the number of blacks in each district and diluting black voting strength. Under the 1976 court-ordered plan, the number of black majority districts is reduced from three (1970) to one in a county which is over 40 percent black.

[4] U.S. Bureau of Census, 1970 Census of Population, General Population Characteristics: Mississippi, PC(1)-26B, Table 34, p. 26-86 (1971).

[5] *Id.*, Table 27, p. 26-62.



Maps showing the boundaries of the pre-1970 districts (old) and 1976 court-ordered districts in Warren County (new) and Vicksburg (detail map) with Census enumeration districts shaded for racial percentage.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

In the view of amicus, this case presents the substantial questions of (1) whether a three-judge District Court convened pursuant to 42 U.S.C. § 1973c to enforce an Attorney General's Section 5 objection has jurisdiction as a Section 5 three-judge District Court to adopt and order into effect a county redistricting plan to which the Attorney General informally has objected, and (2) whether the three-judge District Court erred in adopting the Board plan which provides less equality of population among the districts, fragments and minimizes black voting strength, and allows only one black majority district, over two Justice Department plans which provide greater equality of population among the districts, do not fragment and minimize black voting strength, and result in two black majority districts in a county which is more than 40 percent black.

I. The Three-Judge District Court Lacked Jurisdiction to Adopt and Order Into Effect a County Redistricting Plan.

Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, requires any covered jurisdiction to submit any election law change enacted after November 1, 1964, for approval either by the United States District Court for the District of Columbia or the United States Attorney General. If the change is submitted to the Attorney General, and an objection is lodged, then the covered jurisdiction may seek review of the Attorney General's objection only in the United States District Court for the District of Columbia. *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 549 (1969); *South Carolina* v. *Katzenbach*, 383 U.S. 301, 331-32, 335 (1966); see also, 42 U.S.C. § 1973*l*(b). In any Section 5 submission either to the D. C. District Court or to the Attorney General, the covered jurisdiction has the burden of proof of showing

that the change does not have a racially discriminatory purpose or effect. *Georgia* v. *United States*, 411 U.S. 526, 536-39 (1973); 28 C.F.R. § 51.19.

In a local District Court action challenging the implementation of an election law change for lack of Section 5 preclearance, the jurisdiction of the local three-judge District Court is "limited" to the determination of (1) "whether 'a state requirement is covered by § 5,'" and (2) if covered, whether the required approval of the District of Columbia District Court or the United States Attorney General has been obtained. *Perkins* v. *Matthews*, 400 U.S. 379, 383-85 (1971); *Allen* v. *State Board of Elections*, *supra*, 393 U.S. at 558-59, 561. As this Court held in *Perkins*, *supra*:

> "What is foreclosed to such district court is what Congress expressly reserved for consideration by the District Court for the District of Columbia or the Attorney General—the determination whether a covered change does or does not have the purpose or effect 'of denying or abridging the right to vote on account of race or color.'" 400 U.S. at 385.

On several occasions the District Court for the Southern District of Mississippi has ignored the submission and review requirements of Section 5, *Connor* v. *Waller*, 421 U.S. 656 (1975); *Perkins* v. *Matthews*, *supra*, and the District Court has done so again here.

As a local three-judge District Court convened exclusively to enforce a Section 5 objection and with limited jurisdiction conferred by Section 5, the three-judge District Court was without jurisdiction: (1) to order the defendants or the Department of Justice to devise a new county redistricting plan (Order of July 1, 1975, J.S. App., pp. 14a, 16a), (2) to review the merits of any Section 5 objection by requiring submission to the District Court of any plan submitted for clearance under Section 5 and objected to by the Attorney General (*id.*,

p. 16a), or (3) to itself adopt and order into effect a county redistricting plan for Warren County (Findings of Fact, Conclusions of Law, and Injunction of May 13, 1976, J.S. App., pp. 1a-9a).

This is not a case, like *East Carroll Parish School Board* v. *Marshall*, —— U.S. ——, 47 L.Ed.2d 296 (No. 73-861, decided March 8, 1976), in which Section 5 preclearance is not required when "the reapportionment scheme was submitted and adopted pursuant to court order." 47 L.Ed.2d at 299, n. 6. Here, the three-judge District Court was convened exclusively to enforce the Attorney General's Section 5 objection to the 1970 Board plan, and its jurisdiction was limited to that enforcement role. Thus, it was without jurisdiction to order the defendants to devise a new plan. Further, the District Court itself ordered the defendants to submit their new plan to the Attorney General "for review under Section 5 of the Voting Rights Act of 1965" (J.S. App., p. 14a). Under its own order, once that submission had been made pursuant to Section 5, the District Court lacked jurisdiction, as a Section 5 local three-judge District Court, to review the Attorney General's substantive determination.

This case also is distinguishable from *East Carroll Parish* in that there the police jury "did not purport to reapportion itself in accordance with the 1968 enabling legislation" and in fact "did not have the authority to reapportion itself" because of the Attorney General's Section 5 objection to the Louisiana state law authorizing at-large elections. 47 L.Ed.2d at 299, n. 6. Thus, the power of the police jury to devise a plan providing for at-large elections derived exclusively from the authority of the District Court. Here the Board of Supervisors retained the authority, under Mississippi law, to redistrict "itself on its own authority," see Miss. Code Ann. §19-3-1 (1972), Miss. Code Ann. § 2870 (1956

Recomp.), and therefore Section 5 preclearance of the Board plan under Section 5 procedures was required.

After the Attorney General's objection to the 1970 plan was enforced by the District Court, the Board of Supervisors failed to adopt a new county redistricting plan or formally submit any new plan to the Attorney General for Section 5 review. The December, 1975, submission was considered by all the parties to constitute only an informal conference among the parties, and not a Section 5 submission. Accordingly, without Section 5 preclearance of any new plan, the three-judge District Court was without jurisdiction to order any new plan devised by the Board of Supervisors into effect.

To hold otherwise would be to allow Section 5 covered jurisdictions to avoid Section 5 submission requirements, in which the covered jurisdiction has the burden of proof, simply by implementing an uncleared and objected-to plan in violation of Section 5. This unlawful action would then invite suit by the Department of Justice, and the covered jurisdiction could then submit the uncleared plan to the local District Court for approval in an action in which the Justice Department has the burden of proof. This was the course of conduct pursued by the Board of Supervisors here. It rewards noncompliance with Section 5 (1) by allowing a county redistricting plan to be reviewed by a Mississippi District Court, rather than the Attorney General or the District of Columbia District Court as Section 5 requires, (2) in an action in which the Justice Department, rather than the covered jurisdiction, has the burden of proof.

Because no new plan has been approved under Section 5 requirements, and because the Section 5 three-judge District Court lacked jurisdiction to adopt and order into effect any new plan, Warren County must revert to its prior election law. Thus, the only redistricting

which currently can be enforced in Warren County is the districting which was in effect prior to the 1970 plan.

II. The District Court Erred in Adopting the 1976 Board Plan.

Assuming the Court concludes that the District Court did have jurisdiction to adopt the Board's 1976 plan, then the Court should examine whether the adoption of the Board's plan over the two Justice Department p'ans constituted an abuse of equitable discretion, or alternatively, whether the Board's plan is unconstitutional.

In *Chapman* v. *Meier*, 420 U.S. 1, 26 (1975), this Court held in a legislative redistricting case that a "court-ordered plan . . . must be held to higher standards than a [jurisdiction's] own plan." The context of this holding relates specifically to population apportionment, the Court declaring that a court-ordered plan must "achieve the goal of population equality with little more than *de minimis* variation," 420 U.S. at 27, but has implications beyond that specific context. The Court also held, noting the "practical weaknesses" (id. at 15) of multi-member districts, that absent "persuasive justifications, a court-ordered reapportionment plan of a state legislature must avoid use of multi-member districts . . ." *Id.* at 26-27.

Here the District Court adopted, over the objections of the Department of Justice, a plan submitted by the Board which provided greater population deviations and less equality of population and which fragmented black voting strength, in preference to two Justice Department plans which provided lesser population deviations and greater equality of popu'ation and which did not fragment and dilute black voting strength. Although in terms of population apportionment alone all the plans presented probably met constitutional standards, under the *de minimis* requirement of *Chapman* the District

Court in its equitable discretion should have preferred the plans providing greater equality of population among the districts.

The plan adopted by the District Court also possesses all the characteristics of a racial gerrymander of black voting strength. Black voting strength is effectively minimized and cancelled out when a heavy black population concentration, as exists in Vicksburg here, is fragmented by the new district lines, divided, and dispersed throughout all five districts. *Taylor* v. *McKeithen*, 407 U.S. 191 (1972); *Robinson* v. *Commissioners County, Anderson County, Texas*, 505 F.2d 674 (5th Cir. 1974); *Moore* v. *Leflore County Bd. of Election Comm'rs*, 502 F.2d 621, 622-24 (5th Cir. 1974). The gerrymandering here is achieved by districts which are not compact, which employ long, narrow corridors to reach into the black concentration in Vicksburg, and which follow, not historical boundaries or physical and geographical ground features such as rivers, highways, roads, railroads and other landmarks, but section lines which are invisible to the voter.

By reducing the number of black majority districts from three to one, the court-ordered plan although providing single-member districts operates unconstitutionally "to cancel out or minimize the voting strength of racial groups," *White* v. *Regester*, 412 U.S. 755, 765 (1973), and also meets the test for an objection under Section 5 of the Voting Rights Act by effecting "a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer* v. *United States*, —— U.S. ——, 47 L.Ed.2d 629, 639 (No. 73-1869, decided March 30, 1976).

Whether or not the plan submitted by the Board is unconstitutional as a racial gerrymander, the principles announced by this Court in *Chapman* should operate to restrict the equitable discretion of the District Court

from preferring a plan which minimizes black voting strength over plans which do not, absent some overriding justification or unless the former plan is required to satisfy a "compelling state interest." *Dunn* v. *Blumstein*, 405 U.S. 330, 336-37 (1972); *Harper* v. *Virginia Bd. of Elections*, 383 U.S. 663, 667 (1966).

No such overriding justification was presented here. The District Court preferred the Board's plan because it attempted to equalize the responsibilities of the five county supervisors among the districts by approximately equalizing county-maintained road mileage and land area (J.S. App., pp. 2a, 5a-6a). However, there is no evidence or finding by the District Court that equalization of these factors is necessary to efficient county government in Warren County; indeed county operations had been maintained successfully from 1929 to 1970 with three of the five districts entirely within the City of Vicksburg and with no county-maintained road mileage.[6] Employment of these criteria in county redistricting becomes suspect when conceived only after the Voting Rights Act of 1965 is enacted, when Mississippi blacks are enfranchised and the state's poll tax struck down, and when advanced to justify distorted districts which fragment black voting strength. See *Robinson* v. *Commissioners Court*, *supra*, 505 F.2d at 680.

[6] Under Mississippi law, counties have the option of adopting the "beat system," in which each supervisor is responsible for construction and maintenance of the county roads and bridges in his district, or some form of the "county unit system" in which responsibility for the county roads and bridges is shared among all five supervisors. See Miss. Code Ann. §§ 65-7-95, 65-17-3 through 65-17-7, 65-17-201 through 65-17-205, 65-19-1 through 65-19-5 (1972). Further, apart from road and bridge maintenance, county supervisors have numerous countywide responsibilities regarding county personnel, property taxation, the county budget and budget of the county school district, libraries and recreation, public health and welfare, industrial development, county planning, and other functions. See generally, D. Brammer, A Manual for Mississippi County Supervisors (2d ed., University of Mississippi Bureau of Governmental Research, 1973).

The District Court considered that the Board's plan did not minimize black voting strength by hypothesizing a three-way election in which blacks could elect county officials of their choice with a plurality of the vote in black minority districts (J.S. App., p. 5a). However, there is no evidence that this ever has occurred in Warren County,[7] and no evidence that white Republican voting strength for county office candidates is sufficiently great to allow for an equal division of the white vote.

The District Court rejected Plan 2 of the Justice Department on the strength of the testimony of defendants' planning agent that it "appeared to have been constructed so as to maximize black voting strength in at least one of the five districts" (J.S. App., p. 2a). However, there was no direct evidence of racial motivation in the Justice Department's proposal (*id.*, pp. 2a-3a), and there is no attempt to maximize black voting strength by providing two black majority districts in a 40 percent black county which previously had three.

CONCLUSION

For the foregoing reasons, the Court should note probable jurisdiction and reverse and remand the injunction issued by the District Court for entry of an order limited to enjoining the 1970 Board plan and any new county redistricting plan not approved in accordance with the

[7] Mississippi law requires a majority vote for party nomination in primary elections, Miss. Code Ann. § 23-3-69 (1972), and victory in the Democratic primary generally is tantamount to election. Mississippi law also requires a majority vote to win special elections to fill vacancies in county office, Miss. Code Ann. § 23-5-203 (1972). The order of the District Court requiring a special election and a majority vote to win office under the new plan (J.S. App., p. 8a) thus precludes the election of any candidates supported by the black community in any white majority district.

procedures of Section 5 of the Voting Rights Act of 1965. Alternatively, the Court should reverse the injunction of the District Court adopting and ordering into effect the 1976 Board plan and remand for adoption of one of the Justice Department plans or another plan which provides equality of population among the districts with little more than *de minimis* variation and which does not fragment, dilute or minimize black voting strength.

Respectfully submitted,

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